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In The

Supreme Court of the United States

October Term, 1973

No. 73-1181

ROGER TRENTON DAVIS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

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OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The Order rejecting the Petition for a Writ of Error is set forth in the Petition for a Writ of Certiorari in the Appendix, p. 4a.

JURISDICTION

Petitioner asserts that jurisdiction is founded upon 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Petitioner was convicted by the Circuit Court of Wythe County, Virginia, on March 19, 1973, for felonious distri-

bution of a Schedule I controlled substance, lysergic acid diethylamide, and sentenced to imprisonment for five years in the State Penitentiary. Petitioner moved the Court for a stay of execution in order to apply for a Writ of Error to the Supreme Court of Virginia, and this motion was granted. On November 9, 1973, the Supreme Court of Virginia rejected and refused the Petition for a Writ of Error, the effect of which was to affirm the judgment of the trial court. From this judgment, the petitioner now seeks a Writ of Certiorari from the Supreme Court of the United States. On December 18, 1973, the Supreme Court of Virginia entered an order granting a stay of execution and enforcement of said judgment pending the docketing in the Supreme Court of the United States of this petition.

For purposes of clarity, the petitioner and respondent will hereinafter be referred to as the defendant and the Commonwealth, respectively. All page references will be to the transcript of the proceeding in the Circuit Court of Wythe County and will be designated "Tr."

STATEMENT OF FACTS

At approximately 3:45 p.m. on February 9, 1973, the defendant drove his gray Dodge Charger vehicle into the parking lot of Ray's Kingburger, a drive-in hamburger stand in Wytheville, Virginia (Tr. 93). Already on the scene were two other vehicles, a 1973 Cadillac belonging to Freddie N. Jones and containing as passengers, Howard Wayne Davis, Wayne Randolph Howard, and Donald Joe Copenhaver (Tr. 115), and a Volkswagen driven by Rhonda Neal and containing as a passenger, Teresa Lowe (Tr. 116, 172). In a shopping center parking lot some 300-400 feet away, several police investigators sat in a vehicle observing the scene (Tr. 103).

Freddie N. Jones testified that he watched Wayne Randolph Howard leave his vehicle, approach the vehicle of the defendant, and that the defendant handed Wayne Howard some pills in return for an unspecified sum of money (Tr. 117). Jones also testified that he saw the pills in Wayne Howard's hand from the time he received them from the defendant until Howard returned to the car and transferred five of the pills to Jones in exchange for $10.00. Jones placed the pills in cellophane wrapper and subsequently gave them to Investigator Farthing (Tr. 119, 120, 121, 128). On cross-examination, Jones admitted having been convicted of passing worthless checks (Tr. 125, 126).

Lab analysis revealed that the pills received by Investigator Farthing from Jones contained LSD (Tr. 97, 98).

Howard Wayne Davis testified that he was a passenger in the front seat of the Jones' Cadillac (Tr. 136, 137) and that he saw the defendant pull into Ray's and stop in front of them. He further testified that he saw Wayne R. Howard leave the Cadillac and approach the defendant's vehicle, which was directly in front of the Jones' vehicle on the driver's side (Tr. 138). He next saw the defendant accept money and hand something to Wayne Randolph Howard (Tr. 140). He constantly observed Wayne Howard as he returned to the Cadillac except when Howard passed his side view and entered the vehicle (Tr. 141, 142), and he saw Wayne Howard give Jones pills in exchange for money once Howard was inside the Cadillac (Tr. 143). He also testified that he was not talking to the girls who were in the Volkswagen, but was paying close attention to the defendant and Howard (Tr. 149).

Teresa Lowe testified that Jones and Wayne Howard Davis spoke to her without interruption during the course of time that they were together at Ray's (Tr. 176).

On direct examination by the Commonwealth's Attorney, Wayne Randolph Howard refused to answer the following questions based on his rights under the Fifth Amendment of the United States Constitution:

> "During the course of that conversation, did a gray Dodge Charger drive up?";
>
> "Did you get out of the car while it was parked at Ray's Kingburger?";
>
> "Did you see Roger Davis up there on that particular date?"; and
>
> "Did you see anyone else that you knew on that date while up at Ray's Kingburger other than the occupants of the Volkswagen and the Jones' Cadillac?" (Tr. 156, 157, 158)

Donald Joe Copenhaver refused to answer several questions based on his Fifth Amendment rights, when called as a witness. On direct examination, Copenhaver refused to answer the question, "Mr. Copenhaver, do you know Freddie Jones?" On cross-examination by defense counsel, Copenhaver refused to answer two questions:

> "Got down town, and isn't it a fact that some thirty minutes later, a transaction took place between Mr. Howard and Mr. Jones?"; and
>
> "Did anybody give him any money in your presence?" (Tr. 168, 169)

Copenhaver did testify that Wayne Howard got out of the Jones' vehicle (Tr. 166).

The defendant testified that he was present at Ray's Kingburger for a period of time of only about a minute or so (Tr. 180, 182) and that he talked with Wayne Howard for the purpose of determining where he could locate Jerry

Chapman (Tr. 180). The defendant denied having sold any drugs to Wayne Howard (Tr. 191).

ARGUMENT

I.

No Error Was Committed By The Commonwealth's Attorney In Calling Two Witnesses When He Had Knowledge That They Would Assert Their Fifth Amendment Privilege Against Self-Incrimination.

Douglas v. *State of Alabama*, 380 U.S. 415 (1965), is the most recent case in which the Supreme Court of the United States has considered the issue raised by the defendant herein. In *Douglas*, one Loyd, who been tried and found guilty of assault with intent to commit murder, was called as a witness at defendant's trial. Because Loyd planned to appeal, his lawyer advised him to rely on the privilege against self-incrimination and not to answer any questions. Accordingly, he refused to answer any questions concerning the alleged crime. Subsequently he was declared an adverse witness, and the prosecution read a document, purported to be a confession signed by Loyd, under the guise of refreshing Loyd's memory. The prosecution paused frequently to ask Loyd, "Did you make that statement?" Each time Loyd refused to answer. The document contained a statement that the defendant had been the one who fired the shotgun blast which killed the victim. Loyd's alleged statement that defendant had fired the fatal blast was the only direct evidence that he had done so. This Court found that the alleged statement formed a crucial link in the prosecution's case and that the procedure violated the defendant's rights under the Confrontation Clause of the Sixth Amendment. It was explained that the primary objective of the Confrontation Clause is ". . . to prevent depo-

sitions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . ." 380 U.S. 418-419.

Douglas is clearly distinguishable from the case at bar. In *Douglas*, the prosecution was permitted by an indirect method to put into evidence the statement of the witness that the defendant had been the one who shot the victim. In the case at bar, the witnesses who asserted their Fifth Amendment rights were not examined as to any previous statement in which they had implicated the defendant. In the *Douglas* case, the prosecutor had supplied the suggested answer which the witness refused to give, but in this case, the prosecution merely asked a question, not knowing whether or not it would be answered and not suggesting the answer to the witness or jury in any way. In *Douglas*, the alleged statement formed a crucial link in the prosecution's case, but in the case at bar, the implied answers to the unanswered questions were either testified to fully by other witnesses or the implied answers were favorable to the defendant. Therefore, it is submitted that the defendant cannot rely upon the decision of this Court in *Douglas* to support his contention of error.

In this case, Wayne Randolph Howard refused to answer only four questions out of a large number of questions which were put to him (Tr. 153-162). Those questions were (1) whether a gray Dodge Charger had been at the scene of the alleged drug transaction (Tr. 156), (2) whether he had gotten out of the car at the scene of the alleged transaction (Tr. 157), (3) whether he had seen the defendant on the date of the alleged transaction (Tr. 157-158), and (4) whether he had seen anyone else whom he knew at the scene other than those persons who were in the car with him and two girls in a Volkswagen to whom he was talking (Tr. 158). Assuming for purposes of argument that the jury

assumed that these questions would have been answered in the fashion most prejudicial to the defendant, the respective answers to the above questions would have been (1) that Howard had seen a gray Dodge Charger at the scene, (2) that Howard had gotten out of the car, (3) that Howard had seen the defendant on the date of the alleged crime, and (4) that Howard had seen the defendant at the scene of the alleged transaction. The defendant testified to all of the above in response to questions from his own counsel. His answers were (1) that he had driven a silver Dodge Charger to the scene of the alleged drug transaction (Tr. 179), (2) that Wayne Howard had walked up to the defendant's car and talked to the defendant at the scene (Tr. 181-182), (3) that the date he had seen Wayne Howard was February 9, 1973, and (4) that one of the persons he saw at the scene that he knew was Wayne Howard (Tr. 178A-180). These facts taken from the direct testimony of the defendant correspond to the most prejudicial answers which the jury could have assumed from the questions not answered by Wayne Howard. Under the circumstances, it is clear that the defendant could have suffered no prejudice from the refusal of Wayne Howard to answer the four questions set forth above.

Donald Joe Copenhaver was called by the prosecution, and upon taking the stand, took the Fifth Amendment as to his testimony in its entirety and then testified fully as to the events and circumstances surrounding the alleged drug transaction, taking the Fifth Amendment as to specific questions only three times (Tr. 162-171). On direct examination, Copenhaver refused to answer a question as to whether he knew Freddie Jones. Certainly, even if the jury had assumed that the answer would have been in the affirmative, the refusal of Copenhaver to answer this question could not have prejudiced the defendant. Several witnesses

testified that Copenhaver had arrived at the scene of the alleged transaction in a Cadillac driven by Jones. Copenhaver was subjected to a thorough cross-examination (Tr. 166-171), and during this cross-examination, he took the Fifth Amendment twice to specific questions asked by the defense counsel (Tr. 168-169).

Surely, the defendant cannot be heard to complain that Copenhaver prejudiced the defense by asserting his rights under the Fifth Amendment and refusing to answer two of the defendant's own questions. The defense would have this Court penalize the Commonwealth because Wayne Howard refused to answer four questions of the Commonwealth; one of the grounds for this defense contention is that the implied answers to the questions were prejudicial to the defendant. The defendant asked Joe Copenhaver two questions which he refused to answer; the implied answers to these questions were favorable to the defense and prejudiced the prosecution. Yet, the defendant alleges that error was committed when Copenhaver asserted his Fifth Amendment rights. If we follow the defense theory to its logical extreme, there was indeed error—error committed by the defense which prejudiced the case of the prosecution.

Namet v. *United States*, 373 U.S. 179 (1963), is the leading case in which this Court has considered the issue raised by the defendant herein. In *Namet*, three parties were charged with violation of Federal wagering tax laws. On the day of trial, two of the parties changed their pleas to guilty, and subsequently they were called as prosecution witnesses. Prior to the time the two witnesses were called, counsel had advised the Court and prosecutor that the two witnesses would assert the Fifth Amendment. The Federal District Court judge refused to rule on the claim of Fifth Amendment privilege until the witnesses had actually taken the stand and asserted their rights under the Fifth Amend-

ment. Subsequently, each witness asserted the Fifth Amendment to several questions, but testified fully otherwise. The defense contended that error was committed because the implied answers to the questions were prejudicial to the defendant.

In considering the *Namet* case, this Court made it clear at the outset that the alleged error was not constitutional in nature, but merely evidentiary trial error. The Court then noted that reversible error is not invariably committed when a witness claims his privilege not to answer; however, it was stated that error might be founded (1) upon a concept of prosecutorial misconduct if the government made a conscious and flagrant attempt to build its case on inferences arising out of assertion of the privilege, or (2) upon the theory that inferences from the refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination.

Judge Learned Hand's decision in *United States* v. *Maloney*, 262 F.2d 535 (2nd Cir. 1959), was said by the Court to have been based in part on both of the above theories. The factual situation presented in *Namet* was distinguished from the factual situation which Judge Learned Hand had before him in the *Maloney* case on the following basis:

> "... the present case is not one, like *Maloney*, in which a witness' refusal to testify is the only source, or even the chief source, of the inference that the witness engaged in criminal activity with the defendant. In this case the few claims of testimonial privilege were at most cumulative support for an inference already well established by the non-privileged portion of the witness' testimony." 373 U.S. at 189

It was held by the Court in *Namet* that the few minor lapses of the prosecution, when viewed in the context of

the entire trial, did not amount to a deliberate attempt by the government to make capital out of the witnesses' refusal to answer; nor did the Court find that the few invocations of privilege were of such significance as to constitute reversible error.

It is submitted by the Commonwealth that when the standards set forth in *Namet* are applied to the factual situation in the case at bar, it is clear that no error was committed by the failure of the Commonwealth's witnesses, Wayne Howard and Joe Copenhaver, to answer a total of seven questions. Error cannot be founded upon the concept of prosecutorial misconduct, because there is no evidence of a deliberate attempt on the part of the Commonwealth to make capital out of the refusal of the witnesses to answer questions. The Commonwealth did indeed know that the witnesses intended to invoke the Fifth Amendment, but it did not know at what point or in response to which questions the Fifth Amendment would be invoked. Wayne Howard answered 34 of the 38 questions he was asked in direct examination. Furthermore, a legitimate purpose was served by Wayne Howard's testimony; it established that he was with Freddie Jones at the time and place the alleged offense took place. The defendant cannot seriously contend that there was prosecutorial misconduct in the questioning of Joe Copenhaver who answered all but one innocuous question of the prosecution.

Nor can error be based on the theory that inferences from the refusals to answer questions of the prosecution added critical weight to the prosecution's case. Wayne Howard refused to answer four questions of the Commonwealth's Attorney, and Joe Copenhaver refused to answer one question put to him by the Commonwealth's Attorney. It has previously been shown herein that any inferences which could have been drawn from the refusals of the two

witnesses to answer the five questions would merely have been cumulative with testimony of other witnesses.

Finally, it cannot be contended that error was committed by the Commonwealth merely because two witnesses were called when the Commonwealth had knowledge that they intended to claim their Fifth Amendment rights against self-incrimination. In *United States* v. *Burket*, 480 F.2d 568 (2nd Cir. 1973), it was held that mere knowledge that a witness has expressed an interest in asserting his Fifth Amendment rights does not preclude a prosecutor's calling the witness to see what he will actually do under the sanctity of the oath.

In conclusion, the defendant's assertion of error is not supported under either of the theories set forth by this Court in the leading case of *Namet* v. *United States*, *supra*. No prosecutorial misconduct was involved in the calling of either witness, and the inferences from the refusals to answer questions put by the Commonwealth added little or no weight to the prosecution's case. For these reasons, the Commonwealth submits that the action of the Commonwealth in this case did not amount to error.

II.

No Error Was Committed In The Failure Of The Court To Instruct The Jury As To The Assertion Of The Fifth Amendment Right Against Self-Incrimination By The Witnesses For The Commonwealth.

The Commonwealth contends that because there was, as previously illustrated, no prejudice to the defendant because of the failure of Wayne Howard and Joe Copenhaver to answer certain questions, there was no need for any instruction regarding their refusal to testify.

Indeed, it is to be noted that the defense counsel in the trial court at no time requested an instruction regarding the failure of the witnesses to answer certain questions. As was pointed out in Judge Hinch's strong dissent in *United States* v. *Maloney*, *supra*, such an instruction is as likely to have an adverse as a positive effect. Judge Hinch went on to state:

> "The effect of the admonition being doubtful, I would hold that it was for the defendants to decide for themselves whether the admonition would be helpful, and if so, to make a request for it." 262 F.2d at 539

Judge Hinch concluded,

> ". . . it would have been presumptious for the trial court judge to think that he knew better than the defendant where their interests lay. . . ." 262 F.2d at 540

Therefore, the Commonwealth submits that because no prejudice was done to the defendant through the refusal of the witnesses to answer certain questions, there was no need for a jury instruction on the Fifth Amendment. Even if prejudice were found in the refusal of the witnesses to answer the questions put to them, it is submitted that the defense intentionally refrained from requesting an instruction for reasons of trial strategy and tactics.

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia respectfully submits that this Honorable Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wilburn C. Dibling, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before April 13, 1974, I mailed three copies of the foregoing Brief in Opposition to John R. Prosser and Thomas V. Monahan, 9 East Boscawen Street, Winchester, Virginia 22601, counsel of record for petitioner.

WILBURN C. DIBLING, JR.
Assistant Attorney General